STATE OF MICHIGAN

COURT OF APPEALS

MARY VAGNETTI,

Plaintiff-Appellant,

v

MEIJER, INC.,

Defendant-Appellee.

UNPUBLISHED
May 19, 1998

No. 199232
Macomb Circuit Court
LC No. 95-003606 NO

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

This is a premises liability case, stemming from an injury to plaintiff's hand that occurred while she was shopping at one of defendant's stores. The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), finding that plaintiff failed to present any evidence that defendant had actual or constructive notice of any dangerous condition on its premises. Plaintiff appeals as of right and we affirm.

A trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo by this Court to determine if the defendant is entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court reviews the entire record, and, giving the benefit of any reasonable doubt to the nonmoving party, determines whether a record might be developed that will leave open an issue on which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

To establish a prima facie case of negligence, a plaintiff must prove four elements: (a) the defendant owed a duty to the plaintiff; (b) the defendant breached that duty; (c) the plaintiff suffered damages; and (d) the defendant's breach of duty was a proximate cause of the plaintiff's damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Ordinarily, whether a duty exists is a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

In *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), this Court noted that a storekeeper's liability for injuries caused on its premises is well established in this state:

> It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it. *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968) (quoting *Carpenter v Herpolsheimer's Co*, 278 Mich 697; 271 NW 575 (1937) (emphasis deleted)).

In order to recover from defendant, plaintiff must show either that an employee of defendant caused the unsafe condition or that a servant of defendant knew or should have known that the unsafe condition existed. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it. *Id*. When there is no evidence to show that the condition had existed for a considerable time, a directed verdict in favor of the storekeeper is proper. *Id.*

In *McCune v Meijer, Inc*, 156 Mich App 561, 563; 402 NW2d 6 (1986), this Court affirmed the trial court's decision to grant summary disposition in favor of the defendant-premises owner, because the plaintiff failed to prove that the defendant knew or should have known about a dangerous condition and failed to alleviate the problem. The dangerous condition was a puddle of oil located in the defendant's parking lot. *Id*. at 562. According to the plaintiff, the puddle of oil was small but was surrounded by a larger oil stain which suggested a certain amount of evaporation. *Id*. Because of the slow rate of evaporation, the plaintiff asserted that the oil spill must have existed for a considerable length of time; as a result, the defendant should have discovered the problem. *Id.* at 562-563. This Court stated that the plaintiff's evaporation theory amounted to nothing more than sheer speculation and conjecture, and thus affirmed the trial court's grant of summary disposition in favor of the defendant. *Id*. at 563.

We now turn to the facts of the instant case. While pushing her shopping cart through the children's clothing department, plaintiff brushed her right hand against the end of one of the metal clothing racks which was missing the plastic end cap. Plaintiff admitted that instead of pushing the shopping cart with her hands located on the handle at the front of the cart, she placed her hands on each side of the cart. Plaintiff was looking at the clothing displays and did not know she had cut her hand on the edge of the clothing rack until she felt the bleeding. Plaintiff's son was notified by defendant's employees of plaintiff's injury and he drove plaintiff to the hospital. He then returned to defendant's store to inspect the display racks in the area where plaintiff had been injured. His deposition testimony indicates that approximately six display bars were missing end caps when he returned to the store approximately five hours after the incident.

Plaintiff asserts that defendant's employees' daily inspections of the racks put them on constructive notice of the missing end cap. Because plaintiff's son testified at his deposition that he

noticed several missing end caps in the children's clothing department when he returned to defendant's store after taking his mother for medical treatment, plaintiff contends that the same end caps were likely missing at the time of her injury. However, this is mere speculation. In order to factually support her claim, plaintiff offered the deposition testimony of two of defendant's employees. Their testimony indicates that they do not remember seeing, before plaintiff's accident, a clothing rack in the children's department that was missing an end cap. The employees testified that they would replace the entire arm of a display rack if they noticed that the rack was missing an end cap. Furthermore, the employees stated that they inspected their departments regularly. These inspections included checking display racks for missing end caps.

According to plaintiff, defendant had actual notice of a continuing problem and failed to take measures to alleviate the dangerous condition caused by the missing end caps. However, there is no evidence to suggest how long the end cap had been missing. Indeed, it is equally plausible that plaintiff dislodged the end cap when she pushed her shopping cart into the clothing rack. Another possibility is that a customer or a customer's child removed the end cap just moments before plaintiff's accident. Plaintiff herself is not sure how the accident happened because her attention was diverted. Because plaintiff failed to assert any evidence, beyond mere speculation, from which a reasonable inference could be made that defendant had actual or constructive knowledge of the missing end cap, there is insufficient factual evidence to prove that defendant breached its duty of care to plaintiff. Therefore, summary disposition in favor of defendant was appropriate.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert P. Young, Jr.